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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 775

WILMINGTON TRUST COMPANY, EXECUTOR OF ALICE DUPONT ORTIZ, DECEASED,

Petitioner,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

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STATUTE CITED.

Revenue Act of 1926, c. 27, 44 Stat. L. 110 2

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Opinions Below.

The opinion of the Board of Tax Appeals (R. 604-622) is reported in 42 B. T. A. 173.

The opinion of the Circuit Court of Appeals (R. 649-656) is reported in 124 F. (2d) 156.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on September 3, 1941 (R. 656).

Petition for Certiorari was filed with this Court and was granted as to question 1(a) thereof on January 12, 1942.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether the Circuit Court of Appeals erred in setting aside the findings of fact of the Board of Tax Appeals relating to question 1(a) of the Petition for Certiorari. That question was stated in the Petition for Certiorari as follows:

> "1. Whether the amounts charged as dividends to a taxpayer's short account with a broker may for income tax purposes be offset against amounts credited as dividends to the taxpayer's long accounts. The determination of this question depends upon * * *:
>
> (a) Whether the sales in the taxpayer's so-called short account were in fact 'short' sales."

Statute Involved.

Revenue Act of 1926, c. 27, 44 Stat. L. 110:

> Sec. 1003 (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in Section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 240 of the Judicial Code, as amended.
>
> (b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require. (U. S. C., Title 26, Sec. 1141).

Statement.

This case involves income taxes for the years 1934 and 1935.[1]

The petitioner's decedent, hereinafter referred to as the taxpayer, maintained certain long and short accounts[2] with her brokers[3] through which she purchased and sold securities (R. 18, 19, 20, 21). The securities consisted of shares of stock which were held by the brokers in the form of street certificates (R. 20, 21). Sales[4] were made through

[1] The returns were filed on the cash receipts and disbursements basis (R. 17). They were joint returns for the taxpayer and her husband. The husband had allowable deductions in excess of his gross income for 1934 and no income or deductions for 1935 and, consequently, he is not involved in this litigation (R. 606).

[2] The accounts pertinent to the phase of the case here under consideration, were designated "Regular" (Ex. I, R. 123-167), "Special" (Ex. J, R. 168-207), "Trading" (Ex. L, R. 256-292), and "Short" (Ex. K, R. 208-255). Although there were ordinary sales in each of the accounts, for the sake of convenience we shall refer to the "Regular", "Special" and "Trading" as the long accounts and the "Short" account as such.

[3] From 1925 to October 1, 1932, the accounts were carried with the brokerage firm of Laird, Bissell & Meeds at its Wilmington, Delaware, office. On October 1, 1932, the brokerage firm of Laird & Company was organized and the accounts were transferred to that firm's Wilmington office (R. 18). Although a number of sales had been made in the taxpayer's so-called "short" account prior to the transfer of the accounts, only the net number of shares as determined by considering the long and short accounts as a unit were transferred to the new broker, Laird & Company. This fact was specifically stipulated (R. 21). The position of those shares having a long and those having a short status at that time were as follows (R. 21):

	Longs Shares	Shorts Shares	Net Shares
duPont deNemours & Co.	37,000	9,100	27,900
McKeesport Tin Plate Co.	15,050	8,850	6,200
American Ice Co.	2,500	300	2,200
Baltimore & Ohio R. R. Co.	900	500	400
Continental Diamond Fibre Co.	3,100	3,000	100

[4] During the period from January, 1932 through December 31, 1935, the taxpayer instructed the broker to sell in her short account shares of stock where at the same time like shares were held in her long accounts. Upon receipt of these instructions, the brokers would transmit the order to their New York correspondent to make the sale in the "regular way" on the floor of the New York Stock Exchange, i. e., for delivery on the full business day following the contract (R. 20, 21).

the so-called "short" account and where the taxpayer had sufficient shares in her long accounts to cover the sales in the "short" account the brokers made delivery therefrom, which reduced the taxpayer's long position accordingly.[5] (R. 539, 540, 609, 610). During the years 1934 and 1935, as dividends were declared, instead of crediting the taxpayer with the dividends on the net number of shares determined by treating the long and short accounts as one, the long accounts were credited with amounts equal to the dividends on the total number of shares appearing in those accounts and at the same time the short account was charged with amounts equal to the dividends on the total number of shares appearing in that account as being short.[6] (R. 21, 22, 23).

In her income tax returns the taxpayer treated the sales above referred to as ordinary sales, and set off the amounts charged in the short account as dividends on the shares which had been delivered, against the amounts credited in the long accounts as dividends on those same shares.[7]

The Commissioner of Internal Revenue treated all of the sales in the so-called short account as short sales, ruled that the dividends charged in the short account represented additional cost of stock purchased to cover the short sales and held that they could not be offset against the dividends

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[5] There was a contract between the taxpayer and her brokers by which her long and short accounts were for all purposes to be considered as one and the same, i. e., as a unit (Petitioner's Ex. No. 1, R. 535, 604).

[6] The broker's system of bookkeeping required the crediting of the long accounts and the charging of the short account, instead of simply crediting or charging the taxpayer an amount equal to the dividends on the net number of shares determined by considering the accounts as one and the same (R. 568, 570, 577, 578).

[7] In those instances where the long accounts did *not* contain shares in excess of the number sold through the short account, the sales admittedly were short sales and treated as such (R. 610). Those short sales are in no wise involved in the proceedings before this Court (R. 616). The taxpayer did not set off any dividends on shares actually sold short.

credited to the long accounts (R. 33). The Commissioner determined that there were deficiencies in income taxes for each of the years involved (R. 30a-36).

Upon a petition for redetermination of the proposed deficiencies, the Board of Tax Appeals made a meticulous examination of the evidence, which consisted of a comprehensive stipulation of the parties, voluminous exhibits, and the testimony of witnesses. The Board, in a reviewed decision which was unanimously approved by the members, found that the sales in question were ordinary sales and not short sales, overruled the Commissioner and abated the assessment (R. 605-623). The Board of Tax Appeals found the following facts: (R. 609, 610)

> "Pursuant to the authority granted to treat all the accounts as a unit, Laird & Co., in all cases where the petitioner held in her long accounts shares in excess of those being sold through the short account, did not require any margin and made delivery out of the long accounts against the sale made through the short account, crediting the petitioner with the cash proceeds of the sale. At the time of the sale the delivery of the shares was recorded on the short account and the position in the long accounts was reduced by the number of shares sold."

On appeal, the Circuit Court reviewed the evidence, drew its own factual inferences, rejected the findings of basic fact made by the Board, and held that the sales in question were short sales. In its opinion, the court stated: (R. 650)

> "Quite clearly taxpayer treated the sales as short sales. The transactions were so entered upon her books. Gains or losses were not reported at the moment of sales, as would be done if a long sale were contemplated. Instead the profit or loss entry was not made until the covering transaction was completed. The certificates of stock actually used were in no way designated as belonging to taxpayer. Where dis-

positions of long stock occur, the proceeds are credited to the seller and are immediately available without restriction. Here, however, the money was withheld for no reason other than such a practice is consistent with a short sale."

It is the contention of the petitioner that the court below committed error in overruling the Board of Tax Appeals, there being in the record substantial evidence supporting the Board's finding that the sales in question were not short sales.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred in reversing the Board of Tax Appeals' findings that the sales through the "short" account of the taxpayer were not in fact short sales, when there was substantial evidence in the record to sustain the Board's findings.

ARGUMENT.

The court below erred in setting aside the finding of the Board that the sales in question were ordinary sales and in substituting therefor the court's judgment of the facts.

By reason of the very limited nature of the grant of certiorari, the issue here presented is narrow and sharply drawn. The case turns simply upon a question of fact—Whether there is in the record any substantial evidence to support the Board of Tax Appeals' finding to the effect that the sales made in the taxpayer's short account were not in fact short sales, but, on the contrary, ordinary sales. It was this finding of the Board which the Circuit Court rejected and, after indulging in its own analysis of the evidence, arrived at its own findings of fact, which are diametrically opposite to those found by the Board.

1. The Board of Tax Appeals made findings of fact which, if supported by any substantial evidence, were conclusive on the court below.

In her petition for a redetermination of the deficiencies assessed by the Commissioner, the taxpayer specifically alleged that the sales made in the short account were not short sales (R. 3, 4). The answer filed thereto denied that allegation (R. 15). Thus there was squarely presented to the Board the question of whether or not the sales in the so-called short account were short sales.

Most of the facts pertinent to this issue were undisputed and were the subject of a most comprehensive and far-reaching stipulation of the parties (R. 16-25). The only disputed facts were proved by the testimony of witnesses taken before the Board. The witnesses to whom we refer were the broker's margin clerk, stock clerk and dividend clerk who were familiar with the sales in question (R. 534, 544). The Board, after carefully weighing the evidence which consisted of the stipulated facts, voluminous documentary proof, including the broker's records introduced as exhibits to the stipulation, and the testimony of the witnesses, decided that the sales were ordinary sales and not short sales. In its reviewed decision the Board found as a fact that the sales in question were executed on the Exchange in the regular way and that delivery to the purchasers was made the next full business day; that the brokers required no margin and charged no short-sale tax; that the taxpayer was credited with the proceeds of the sales; that interest was paid her on those proceeds; *that delivery was made at the times of the sales from stock of the taxpayer and that no stock was borrowed for the purpose of making delivery* (R. 615, 616).

The issue and the pertinent findings of fact were emphatically and cleared stated by the Board in its opinion as follow:[8] (R. 615, 616)

> "If, as the respondent (Commissioner) says, delivery to the purchasers in this case was made from shares belonging to the brokers or their customers or from shares borrowed from other brokers, the sales clearly would be short sales. However, the facts are otherwise.
>
> The orders were executed on the exchange in the regular way and delivery to the purchasers was made on the next full business day from certificates in street names held by the New York correspondents for Laird & Co. It is true that the shares so delivered were not identifiable by certificates as shares belonging to the petitioner (taxpayer), but they necessarily included shares held by the brokers for the petitioner (taxpayer). The understanding between the petitioner (taxpayer) and the brokers, the mode of operation, and the manner in which the transactions were reflected on the brokers' records demonstrate that the deliveries were in effect deliveries from the petitioner's (taxpayer's) long accounts. None of the sales orders were labeled as short sales. * * * We are here dealing with shares where those in the long account exceeded those in the short account. In every instance where the long accounts contained shares equal to or greater in number than those sold, it was the practice of the brokers, acting under authority to treat all accounts as a unit, to treat the sales made through the short account as sales of the petitioner's (taxpayer's) long shares. They required no margin and charged no

[8] Conclusions of fact appearing in the Board's opinion have the full force and effect of findings of fact. *Baker* v. *Commissioner*, 115 Fed. (2d) 987 (C. C. A. 6th, 1940); *Flynn* v. *Commissioner*, 77 Fed. (2d) 189 (C. C. A. 5th, 1935); *Keck Investment Co.* v. *Commissioner*, 77 Fed. (2d) 244 (C. C. A. 9th, 1935) (Certiorari denied 296 U. S. 633); *Insurance & Title Guarantee Co.* v. *Commissioner*, 36 Fed. (2d) 842 (C. C. A. 2d, 1929) (Certiorari denied 281 U. S. 748); *Olsen* v. *Commissioner*, 67 Fed. (2d) 726 (C. C. A. 7th, 1934) (Certiorari denied 292 U. S. 637).

short sale tax. They credited the short account with the proceeds, made an entry therein showing delivery of the shares, and made (fol. 692) entries in the long accounts reducing the number of shares held therein by the number sold through the short account. All of this was done at the time of the execution of the sale to the purchaser. Interest was allowed on the proceeds. That delivery from the long account was made at the time of the sale is established by the testimony of two employees of Laird & Co., who handled the stock records and dividend collections, and it is further corroborated by what was done when Laird & Co. took over the petitioner's (taxpayer's) accounts on October 1, 1932. Laird, Bissell & Meeds did not transfer to Laird & Co. the total shares in the long accounts and an outstanding obligation to repay the shares having a short status, but merely delivered the net number of shares. The witnesses further testified that in every case where the long position exceeded the short position the broker did not borrow any stock from other brokers or other customers for the purpose of delivery."

After it had found the foregoing basic facts, the Board very properly held that the sales in question were not short sales.' In reaching this ultimate finding, that body applied to the basic facts settled principles announced by this Court.

In *Provost* v. *United States*, 269 U. S. 443, 450-51 (1926), this Court defined a short sale:

> "As the phrase indicates, a short sale is a contract for the sale of shares which the seller does not own or the certificates for which are not within his control so as to be available for delivery at the time when, under the rules of the Exchange, delivery must be made."

Again, in *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S. 170, 175 (1926), this Court announced:

> "A short seller borrows what he sells, and the purchase price goes to the lender and is retained as security

for repayment. The seller receives nothing until he repays the loan."

It is manifest that the borrowing of the securities sold is the absolute and indispensable element of a short sale. The Board of Tax Appeals recognized that the effect of a short sale was to create a debt in terms of goods (stock), and that unless stock was borrowed for the purpose of making delivery the sales were ordinary sales and not short sales. After a painstaking examination of the evidence, the Board found as a fact that no stock was borrowed in order to complete the sales here involved and, consequently, that the sales were not short sales (R. 616).

It is firmly established that the Board of Tax Appeals is the trier of the facts. The only question which the court below was authorized to determine was whether the facts found by the Board were supported by any substantial evidence. (See authorities cited, *infra*, p. 18.)

2. The record contains substantial evidence which not only supports but also compelled the findings of fact made by the Board.

We shall not burden this Court with a review of all of the evidence supporting the Board's findings. We shall simply point out some of the pertinent evidence. The following constitutes substantial evidence that the sales were not short sales:

The crucial finding of the Board was that as the sales here involved were made, delivery of the securities sold was made from stock in the taxpayer's own long accounts and, most important of all, that *no stock was borrowed to complete the sales.* The Board recognized the pivotal nature of the facts concerning the borrowing of securities when it said: (R. 615)

"If, as the respondent says, delivery to the purchasers in this case was made from shares belonging

to the brokers or their customers or from shares borrowed from other brokers, the sales clearly would be short sales. However, the facts are otherwise."

The Board carefully weighed all of the evidence and found as a fact that no stock was borrowed. The evidence upon which that finding was predicated appears from the finding itself (R. 616).

"That delivery from the long account was made at the time of the sale is established by the testimony of two employees of Laird & Co., who handled the stock records and dividend collections, and it is further corroborated by what was done when Laird & Co. took over the petitioner's (taxpayer's) accounts on October 1, 1932. Laird, Bissell & Meeds did not transfer to Laird & Co. the total shares in the long accounts and an outstanding obligation to repay the shares having a short status, but merely delivered the net number of shares. The witnesses further testified that in every case where the long position exceeded the short position the broker did not borrow any stock from other brokers or other customers for the purpose of delivery."

We are driven to the conclusion that the court below did not even examine the evidence referred to by the Board. The finding that the taxpayer's stock held in her long accounts was delivered to complete the sales in her short account was based upon clear and direct evidence. Maxwell, the broker's margin clerk, whose duty it was to keep strict account of the margin required on every transaction handled by his firm, testified in detail (R. 533-43). The witness was familiar with the taxpayer's transactions, which went through his hands (R. 534). He stated that in view of the agreement that all of the taxpayer's accounts should be considered as one, no margin was required on the sales in her short account when her long accounts contained suffi-

cient shares for delivery on the sale (R. 534-5, 537). He was carefully examined and cross-examined regarding each step taken to complete the sales in question. All of his testimony respecting the delivery on the sales in which we are interested is consolidated in the following clear and direct question and answer (R. 538):

> "Q. And you delivered her stock against these sales?
> A. That is correct."

Wingate, the stock clerk, responsible for all of the securities in the broker's custody, was examined with the same care (R. 543-65). He testified (R. 554):

> "Q. Then you delivered her long stock to the purchasing broker through your New York correspondent when the sales were made in the short account.
> A. That is the idea."

It cannot be seriously contended that the Board's finding that the taxpayer's long stock was delivered on the sales in the short account was not based upon substantial evidence. As stated by the Board, the testimony of the witnesses was corroborated by what was done at the time the accounts, both long and short, were transferred to Laird & Company. Laird, Bissell & Meeds did not transfer to Laird & Company the total shares appearing in the long accounts, and that firm's obligation to repay the shares having a short status, (certainly this would have been the procedure had the sales been short sales) but merely delivered to Laird & Company the net number of shares. This fact cannot be controverted, for it was specifically stipulated (Stip., Par. 13, R. 20-21).

The Board's finding that no stock was borrowed is the crux of this case. That fact is amply supported by the record. A reference to the chart made by the Board of Tax Appeals (R. 609) from the stipulation of the parties (R. 22, 23) reveals that the dividends which the Commissioner sought to include in taxable income were the dividends on duPont, McKeesport, Phillips Petroleum, Equitable Office

Bldg., and Continental Diamond Fibre, those being the only securities held in the long accounts which were sold through the short account. They are the only securities of the taxpayer which were the subject of the sales in controversy. Wingate, the stock clerk, testified at length regarding the transactions in each of those stocks. His testimony was that no stock was ever borrowed to cover her sales of those securities (R. 548, 554, 556). This was necessarily true for the very obvious reason that the taxpayer's shares were delivered in accordance with her agreement that all of her accounts were to be treated as a unit (R. 535). Wingate's evidence is summarized in this unchallenged testimony (R. 553):

> "Q. So that the only time you ever borrowed for Mrs. Ortiz was when her short position exceeded her long position?[9]
>
> A. That is right.
>
> Q. And then you actually borrowed the stock?
>
> A. That is right."

The foregoing is substantial evidence supporting the basic finding that no stock was borrowed. It is uncontradicted evidence which compelled the conclusion that the sales were ordinary sales and not short sales.

It appears from the Board's opinion (supra pages 8 and 9), that there were certain surrounding facts found by the Board which buttressed its finding that no stock had been borrowed in order to effect delivery on the sales here involved. The Board's finding of those facts is likewise supported by substantial evidence.

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[9] It will be borne in mind that the only sales involved in this litigation are sales in the short account when the long accounts contained a sufficient number of shares of the stock sold to permit delivery. Admittedly when the long accounts contained an insufficient number of the shares sold, the sales were short sales. Indeed, in such cases there were no dividends credited to the long accounts and consequently nothing against which to set off the charges.

(a) The finding that the sales were executed on the Exchange in the regular way and delivery to the purchasers was made on the next full business day from certificates in "street" name cannot be controverted. Those facts were specifically stipulated in the very language in which they were found by the Board (R. 20, 21).

(b) The broker's failure to require margin on the sales is significant for the reason that in executing short sales margin is required in order to protect the broker against the possibility of a rising market in the security sold. The broker executing short sales, borrows the security sold in order to make delivery, and thereby incurs responsibility for the return of that security or its worth in money. Such a broker requires margin from his short sale customer to protect the broker against possible liability on his loan transaction. Naturally, this is not true of ordinary sales.

Maxwell, the broker's margin clerk, testified (R. 534-5):

> "Q. Well, when one of these sales for duPont, for instance, which is one of the most important accounts, came through your hands, what were your margin requirements on that sale? Did you have any marginal requirements for that, where she had in the long account at this time, the regular account, a greater number of shares than she was selling short?
>
> A. The marginal balance would be an offset. I mean by that, if she sold stock in her short account it balanced off against the long account for an equal number of shares.
>
> Q. Why would you do that?
>
> A. Because she had stock in the long account.
>
> Q. Do you have a contract with her that you could do that?
>
> A. Yes, sir.
>
> . . . . . .

(R. 536)

"Q. Now, Mr. Maxwell, as margin clerk, when these various sales of securities went through your hands—duPont, McKeesport Tin Plate, Phillips Petroleum, Continental Diamond Fibre, and a few others—when a sale came to you which indicated a sale through the short account, as you stated a few minutes ago, there was no margin required.

A. That is right."

The broker's refusal to charge a short sales tax is important because it shows that at the time of the transactions they were treated not as short sales, but as ordinary sales. The fact that no such tax was charged, and the importance of that fact, appear from the testimony (R. 548).

Wingate, stock record clerk of the broker stated (R. 547-8):

"Q. Are you the clerk that makes out the charge slip for short tax?

A. I am.

Q. Why didn't you make one out for the McKeesport [10] account?

A. Because she was not short; that is the reason we did not make it out.

Q. You mean you did not borrow the stock?

A. That is right, we did not borrow the stock; that is why we did not charge a federal tax."

Again Wingate testified (R. 548-9):

"Q. Now, as Mrs. Ortiz continued to make these purchases and sales through the short account, you would make a charge for federal tax?

A. Yes, any time she went short we charged her the tax.

Q. If you borrowed the stock?

[10] The witness was here testifying about one of the securities which was the subject of one of the sales in controversy. It appears from his subsequent testimony that his evidence regarding this security was true of all of the transactions (R. 548, 549).

A. If we borrowed the stock.

Q. You would charge a short tax; otherwise, you used her stock?

A. Used her own stock."

It is quite apparent that the witness was testifying with respect to matters that were a part of his duties and with which he was personally familiar. His testimony is not contradicted. On the contrary it is supported by the records of the broker introduced in evidence.[11]

(c) The finding that upon completion of each of the sales the broker credited the taxpayer in her short account with the proceeds of the sale cannot be challenged. This fact was stipulated by the parties in paragraphs 12 and 14 of the stipulation (R. 20, 21). Certainly the respondent will not urge that a finding of fact predicated upon its own stipulation is not based on substantial evidence. The significance of the fact that the taxpayer received the cash proceeds from the sales in the short account appears from the *Bowers* case, *supra* (p. 9), where this Court recognized that the proceeds of a short sale had to be retained by the broker in order to protect the lender of the shares used for delivery to the purchaser in a short sale transaction.

(d) The fact that the broker paid the taxpayer interest on the proceeds of the sales was of importance to the Board because interest was not paid to the vendor, on the proceeds derived from a short sale.[12] The Board's finding that in-

[11] The short account contains only nine entries of Federal Short Sale Tax (R. 238, 239, 240, 241, 247, 254) which were charged on short sales not here involved; while the trading account through which the vast majority of the taxpayer's true short sales were made contains a multitude of such entries (R. 256, 262, 269, 272, 273, 274, 276, 278, 280, 281, 282, 283, 287, 290, 291, 292).

[12] The witness Maxwell testified that where a true short sale was executed, the customer got only a fictitious credit for the proceeds, which were in fact held by the broker in order to protect the person from whom the stock used for delivery was borrowed (R. 538, 543). It also clearly appeared that no interest was allowed on the proceeds of a short sale (R. 538, 552).

terest was credited to the taxpayer is supported by positive evidence. It was expressly stipulated that while the taxpayer was dealing with Laird, Bissell & Meeds, interest was paid on the credit balance in the short account (R. 20). This practice was continued by Laird & Company, as is shown by the following testimony (R. 536, 538):

"Q. In other words, did you credit her account with the cash proceeds with (of) that sale? That is, I am referring to a sale being made where there was a greater position in the regular account or the special.

A. Yes, the credit would go to her balance.

Q. And you gave her interest?

A. That is right.

* * * * * * *

Q. I notice that your brokerage account shows a credit for interest of 5 percent to the extent that your short position does not exceed your long position.

A. That is right.

Q. Because it is a true credit?

A. That is right.

Q. But where the short position exceeds the long position there is no credit?

A. No credit.

Q. So she is charged with a federal short tax and she is denied an interest credit for every day throughout the period or month that that account remains actually short?

A. Absolutely."

The most cursory examination of the so-called short account reveals that the broker's records confirm the statements of the witnesses. At the end of each month the taxpayer was credited with interest on the proceeds of the sales in question (R. 208-255).

The foregoing adequately demonstrates that the findings of the Board were based upon substantial evidence. It is quite apparent that the uncontradicted testimony of the

witnesses who were actually familiar with the sales in controversy is not only substantial, but indeed irrebutable evidence. While that evidence did not appeal to the court below as strongly as other evidence, nevertheless it is substantial evidence which, we submit, compelled the finding of the Board to the effect that the sales were not short sales.

3. The Circuit Court's reversal of the Board was clear error, first, because the court usurped the jurisdiction of the Board, and secondly, because the court proceeded to find other facts which are contradicted by the record.

It is settled that under the statute (Sec. 1003 (b) *supra*, p. 2), the only issue to be determined by the court below was whether there was any substantial evidence in the record to support the findings of fact made by the Board. As we shall demonstrate, the court below neglected that issue and addressed itself to a reweighing of the evidence in order to make its own findings of fact. In so doing the court ignored the Board's findings of fact, which were amply supported by the evidence, but which facts did not fit into the court's own conception of how the case should have been decided by the Board. This action on the part of the court below, as often stated by this Court, is not the function of a court on appeal from the Board of Tax Appeals. *Helvering* v. *Kehoe*, 309 U. S. 277, 279 (1940); *Helvering* v. *Rankin*, 295 U. S. 123, 131 (1935); *General Utilities Co.* v. *Helvering*, 296 U. S. 200, 206 (1935); *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37, 40 (1937).

In two short paragraphs of its opinion the Circuit Court set aside the facts found by the Board and substituted therefor the court's own judgment of the facts. In the first of the paragraphs referred to, the court below said: (R. 650)

"Quite clearly taxpayer treated the sales as short sales. The transactions were so entered upon her books. Gains or losses were not reported at the moment of sales, as would be done if a long sale were contemplated. Instead the profit or loss entry was not made until the covering transaction was completed. The certificates of stock actually used were in no way designated as belonging to taxpayer. Where dispositions of long stock occur, the proceeds are credited to the seller and are immediately available without restriction. Here, however, the money was withheld for no reason other than such a practice is consistent with a short sale."

The quoted language demonstrates that the irreconcilable conflict between the Board and the court exists, not upon any principle of law (the legal definition of a short sale) but *upon the basic facts of this case.*

Particular attention is invited to the Circuit Court's finding that the money representing the proceeds of the sales in question "was withheld for no reason other than such a practice is consistent with a short sale". Not only is this finding without any support whatever in the record, but it is directly contrary to the true facts. It was specifically stipulated that while the accounts were with Laird, Bissell & Meeds, "the proceeds were credited to the 'Alice duPont Ortiz Short' account" (Stip., Par. 12, R. 20). The same was true after the accounts were transferred to Laird & Company. It was stipulated: (Stip., Par. 14, R. 21)

"Laird & Company *thereupon* credited the 'Alice duPont Ortiz Short' account with the proceeds of the sale." (Italics ours.)

It is the function of the Board, not of the Circuit Court, to weigh the evidence, to determine the credibility of witnesses, to draw such inferences as are to be drawn from the facts proven, and to choose between conflicting in-

ferences. For the court to usurp these functions is error. *Helvering* v. *Lazarus & Co.*, 308 U. S. 252, 255 (1939); *Helvering* v. *Johnson*, 308 U. S. 523 (1939) (Per Curiam affirming 104 F. (2d) 140); *Palmer* v. *Commissioner*, 302 U. S. 63, 70 (1937); *Elmhurst Cemetery Co.* v. *Commissioner, supra; Tracy* v. *Commissioner*, 53 F. (2d) 573, 578 (C. C. A. 6th, 1931) (Certiorari denied 287 U. S. 632). It is quite apparent that the court below did not permit the Board to be the arbiter of the facts. The court substituted its own weighing and evaluation of the evidence and factual inferences for those of the Board. This is further shown by the next succeeding paragraph to the one above quoted from the court's opinion: (R. 650)

> "In arriving at its conclusion that the dispositions were not intended to be short sales, the Board relied upon the testimony of certain employees of taxpayer's broker. Considering the statements of these men in the light of their duties, the findings are unsupported. The particular function of a stock-clerk must be appraised in *weighing* his testimony and if a customer's long account had sufficient number of shares, deliveries were made out of that stock. As a stock-clerk he was concerned only with the net position of the broker. From his testimony it cannot be said that the broker did not use borrowed stock to make deliveries on short sales. Nor can his testimony have any bearing upon taxpayer's intention other than through his admission that the sales were treated as short sales for bookkeeping purposes. A dividend-clerk testified that he collected dividends only on the amount that the long stock exceeded the short. His concern with taxpayer's net position was because it was his function to collect an amount equivalent to dividends (fol. 98) on the broker's net holdings from the broker's correspondent in New York, who in turn would collect dividends from the corporation. But this evidence does not refute the actual entries in the customer's ledger crediting dividends on the long accounts and charging

dividends on the short. Nor can any more be said for the testimony of a margin-clerk who stated that none of the sales tickets bore the words 'short sales.' The absence of this designation is not determinative since it does not appear that sales concededly short were so labeled." (Italics ours.)

We think that it will not be seriously denied that there was no attempt on the part of the court below to ascertain whether there was evidence of a substantial nature to support the Board's findings. It is manifest from the language itself that the court did not look into the evidence to determine whether it was legally sufficient to sustain the findings, but proceeded to weigh the evidence and to determine for itself the credibility of the witnesses, thereby usurping the power reposed exclusively in the Board of Tax Appeals. As appears from the language quoted from the Board's findings (supra, pages 8 and 9), the Board had fully discharged its duty in this respect.

The Circuit Court's failure in this respect is pointedly illustrated by the court's observation that from the testimony of one witness "it cannot be said that the broker did not use borrowed stock to make deliveries on short sales." This observation reaches the very crux of the question of whether the sales were short sales.

With regard to the same testimony, the Board had stated:

> "The witnesses further testified that in every case where the long position exceeded the short position the broker did not borrow any stock from other brokers or other customers for the purpose of delivery." (R. 616).

A comparison of the Circuit Court's opinion and the Board's findings reveals that the court sought to avoid the impact of the facts found by the Board by the simple expedient of setting aside those facts and substituting therefor the court's own factual conclusions. This the

court sought to accomplish by selecting a part of the evidence—the taxpayer's method of keeping her books—and eliminating other evidence relied upon by the Board. In an attempt to justify its action, the court disregarded the testimony of witnesses who had testified before the Board, observing that in the light of the duties of those witnesses, their testimony should not have been relied upon in determining the facts. Then the court concluded that the findings of the Board were unsupported. In this respect the court proceeded upon the assumption that the Board's findings were rested solely upon the testimony. Such an assumption was not warranted. The Board's opinion (R. 604-622) reveals that the Board gave full and careful consideration to all of the evidence. It is patent from the Board's language that the testimony of witnesses was relied upon to corroborate and supplement the stipulated facts and broker's records.

The Board's findings are supported by overwhelming evidence. Even if the evidence were less conclusive, the action of the court below would still be erroneous.

Conclusion.

The judgment of the court below should be reversed, with direction to dismiss the respondent's Petition for Review, or to affirm the decision of the Board.

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